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March 28, 1998

By Facsimile and Regular Mail

H. Mike Warren
Section Chief
CALEA Implementation Section
Federal Bureau of Investigation
14800 Conference Center Drive
Chantilly, Virginia 20153-045

Re: Clarification of Final Capacity Notice

Dear Mike:

The Cellular Telecommunications Industry Association ("CTIA") understands that the Department of Justice is willing to provide further clarification concerning interpretation and implementation of the recently released Final Notice of Capacity, 62 Fed. Reg. 12218 (March 12, 1998). This letter requests the Department's official position on the following points, which we discussed both at the Department's March 17th meeting at CTIA and in our follow-up conservation on March 19th.

Request for Clarification No. 1 - Calculating Capacity:

As you know, CTIA disagrees with the Department's position in the Final Capacity Notice that one interception actually may require many content channels, depending on the features and services used by a target. However, CTIA understands that it was not the intent of the Department to treat these additional content channels as a *capability* instead of a *capacity* requirement, the cost of which would be borne by carriers. Rather, the additional channels are a capacity requirement and, for purposes of the 180-day carrier statement to be filed under Section 104 of CALEA, carriers should assume that the actual and maximum capacity listed in the Appendices must be increased to account for delivery of all of the content of a target's communications using advanced calling features.

Thus, per the example in the Final Capacity Notice, if a carrier has an actual capacity requirement of 2 and a maximum capacity requirement of 4, and if it offers 3

advanced calling features so that 5 channels are required to deliver all of the target's call content and call-identifying information, then a carrier should assume for purposes of its 180-day carrier statement that it needs 10 actual and up to a maximum of 20 ports for delivery of capacity. A carrier should not assume that an actual capacity of 2 means only 2 ports if it offers advanced calling features. Indeed, if it offers services that require more channels to ensure delivery of all call content and call-identifying information, it must anticipate as much in its 180-day carrier statement. 62 Fed. Reg. 12218, 12232.

In sum, the Department expects carriers will understand that actual delivery of capacity may require more content channels than the actual or maximum capacity numbers set forth in the Appendices of the Final Capacity Notice, and is willing to clarify that point in response to this letter.

Request for Clarification No. 2 - Payment for Delivery of Capacity:

Based on the above discussion, as CTIA understands the Department's position, the Department agrees that the additional channels and ports required are a cost of capacity, not capability, and that any carrier reporting pursuant to a 180-day carrier statement, based on the above assumptions, will be deemed in compliance unless the Department agrees to reimburse the carrier for costs of meeting what can be called the "delivery capacity". Thus, any equipment or facilities associated with delivery capacity will be reimbursed by the Department.

Request for Clarification No. 3 - New Entrants:

CTIA understands that it is the Department's position that a new entrant into a market (i.e., one that installs a switch and begins delivering service 181 days after publication of the Final Capacity Notice) has to meet the full capacity number for its geographic area. However, the Department has attempted to introduce some flexibility on meeting capacity, such as permitting capacity to be reserved as opposed to installed.[1] Nonetheless, the Department has said it will <u>not</u> negotiate on the number

[1]Clarification of what it means to "reserve" capacity also would be helpful. Does this mean that a carrier has enough channels even though they are available and routinely used for commercial traffic, but could be dedicated upon notice from law enforcement exclusively to meet capacity for a

of simultaneous wiretaps that a new entrant must support. Thus, a new wireless entrant in the New York area would have to support 181 simultaneous wiretaps, or with a switch-based solution, 163 wiretaps. Because these could all be content-based interceptions, the new entrant would have to reserve at least 163 channels, but with advanced calling features, the number could rise to a least 815. Obviously, such capacity could subsume the entire commercial base of the new entrant.

In our discussions, you indicated a willingness to address such impacts but the Final Capacity Rule contains no discussion of such possible (in fact highly likely) impacts to new, facitities-based wireless entrants. How will the Department address such impacts?

Further, there was some discussion about the allocation of channels between content and call-identifying information based on a comparison of the historical numbers of pen register and content interceptions. As you know, industry urged such an application across the board and in fact, when discussing high-end switch capacity, the Department engages in such an approach to arrive at a lower switch capacity requirement in high-end areas of surveillance. However, as written, the Final Capacity Notice leaves no alternative for a carrier but to assume that all interceptions will be content-based. While this is not unique to new entrants, its impact is potentially greater because the subscriber base is less and the entrant's cost of new facilities is higher than established carriers. Is the Department suggesting that there be an allocation of capacity between pen register and content-based interceptions on a carrier-by-carrier basis?

Request for Clarification No. 4 - Meeting Capacity:

As you know, Section 104 of CALEA requires carriers to advise the FBI via a carrier statement whether, based on the Final Capacity Notice, it can accommodate simultaneously the number of interceptions specified in the Notice. The Final Capacity Notice does not define what it means to meet capacity and, informally, the FBI has indicated that it expects historical levels of capacity would continue without reimbursement and that the Department would pay capacity costs over and above that amount. Obviously, CTIA does not agree with that interpretation or that the issue

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short-term period? If so, for how long of a period and, if so, how fast would they have to be made available?

should be left to individual interpretations under the Department's cost reimbursement rules. Further, carriers submitting 180-day carrier statements must be concerned about accurately reporting whether they can accommodate capacity so as to not inadvertently make a false statement.

To illustrate the point, we discussed a scenario where the carrier had been providing 6 ports on a regular basis for surveillance but under the Notice would have to provide 10. Your preliminary view, which we ask you to conclude, was that the carrier would be entitled to reimbursement only for the costs associated with providing 4 additional ports. This is not CTIA's interpretation, and we believe that any such historical analysis would be confusing to carriers and law enforcement alike but in any event must be part of a rulemaking if it is to be the rule for submitting the 180-day carrier statement. At present, CTIA is aware of no carrier that reserves a specific amount of capacity or associated equipment for law enforcement needs without compensation for the service. CTIA understands that CALEA requires law enforcement to pay all of the costs of capacity. If the Department expects carriers to entertain some other approach in calculating whether it can accommodate capacity, CTIA requests that the Department clarify it in response to this letter.

Request for Clarification No. 5 - Reimbursement Eligibility:

CTIA understands that the Department's position is that only carriers that file 180-day carrier statements are eligible for any reimbursement. New entrants (or those that misunderstand the delivery capacity analysis above and therefore do not file), according to the FBI, must meet the specified capacity at their own expense. The Final Capacity Notice does not expressly acknowledge this position despite industry comments on the Second Capacity Notice asking for that clarification.

Request for Clarification No. 6 - Distribution of Capacity:

CTIA understands that, in response to a 180-day carrier statement, the FBI will negotiate a distribution of capacity throughout a service area for a carrier. For example, the FBI may well agree that a carrier with 5 switches in a service area - one in an urban area and 4 serving rural sectors - can allocate capacity largely to the one urban switch so long as capacity can be achieved throughout the entire service area. Without commenting o the technical feasibility of non-switch based capacity solutions, the Department has indicated to CTIA that such a distribution scheme will be binding on state and local authorities and other federal agencies. That is, carrier

will only have to negotiate the implementation once with the FBI and will not be subject to enforcement-action under Section 108 of CALEAif a local agency believes the carrier's obligation is to support the actual capacity number for one of the rural switches. Again, the Final Capacity Notice does not state as much and the Department's clarification of this point is important.

CTIA appreciates the Attorney General's commitment to clarifiy capacity issues and we look forward to working with you to ensure a common understanding of carrier capacity requirements.

Sincerely,

Albert Gidari

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cc: Tom Wheeler, CTIA